

**IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA**

ALABAMA ALWAYS, LLC, et. al.,)	
)	
Plaintiff,)	
)	
v.)	Case No.: CV-2023-000231
)	
STATE OF ALABAMA MEDICAL)	
CANNABIS COMMISSION,)	
)	
Defendant.)	

**MOTION FOR RECONSIDERATION OF EXPEDITED DISCOVERY ORDER AND
ALTERNATIVELY, ENTRY OF A PROTECTIVE ORDER LIMITING THE SCOPE OF
DISCOVERY**

COMES NOW the Defendant, the Alabama Medical Cannabis Commission (“Commission”), by and through its undersigned attorneys, and pursuant to Alabama Rule of Civil Procedure 26(c) moves this Court to reconsider its January 3, 2024, Order granting expedited discovery [Doc. 646] and, alternatively, to enter of a Protective Order limiting the scope of such discovery. In support thereof, the Commission states as follows:

1. Intervenor Insa Alabama (“Insa”) and Consolidated Plaintiff Alabama Always, LLC (“AA”) have filed Motions for Expedited Discovery based on the Alabama Open Meetings Act (“AOMA”), Ala. Code § 36-25A-1, *et seq.* AA has alleged that “at least some of the Commissioners held serial or private meetings prior to the scheduled meeting to discuss how they would rank the applicants, in violation of the [Alabama Open Meetings Act (“AOMA”).]” [Doc. 607 at 22].

2. Insa, which has not filed a verified complaint as required for an AOMA violation claim, has nonetheless alleged that it has it on “information and belief” that “at least some commissioners” violated the AOMA by holding “serial or private meetings prior to the scheduled

meeting to discuss how they would rank. [Doc. 564 at ¶ 1]. AA argues that discovery is needed to “learn what occurred during the Commissioner’s deliberations . . .” [Doc. 564 at 23] and Insa argues discovery is needed to learn “how the Commissioners made their rankings, what objective information they considered in making their rankings, and any communications regarding the applicants that occurred outside of the December 12, 2023 hearing. . . .” [Doc. 636].

3. On January 3, 2024, the Commission filed its Response in Opposition to the Motions for Expedited Discovery. [Doc. 640]. As set forth in the Response, which is incorporated herein, neither AA nor Insa have met any of the statutory requirements to advance an AOMA claim or to conduct related discovery.

4. Shortly after the Commission’s Response was filed, the Court entered an Order permitting Plaintiffs Insa Alabama, LLC (“Insa”) and Alabama Always, LLC (“AA”) to conduct discovery, stating in relevant part:

Plaintiffs are collectively authorized to take up to six (6) depositions upon five calendar days’ notice, with such depositions to be completed no later than January 19, 2024. Plaintiffs are further collectively authorized to serve ten (10) requests for production within one week, with responses (including responsive documents) due no later than January 19, 2024. Finally, Plaintiffs are collectively authorized to issue ten (10) interrogatories and ten (10) requests for admission, to be issued within one week, with responses due no later than January 19, 2024. For good cause shown, the Court may raise the limits set in this Order.

[Doc. 646].

5. The Commission urges the Court to reconsider its Order granting discovery in the midst of the Commission’s ongoing administrative process in light of the failure of the Plaintiffs to meet any prerequisites for an AOMA claim. Mere speculation based on the length of public debate in a public meeting is not enough.

6. Alternatively, the Commission requests the Court issue a protective order limiting any discovery to those facts that, if established, would constitute a potential AOMA violation, as specified in the statute:

1. The existence of any non-public meeting of a quorum of the Board in which the specific applications, or their rankings, were deliberated. Ala. Code § 36-25A-2 (1),(6) and (12).

2. The existence of any meeting, not open to the public, involving two or more Commission members not involving a quorum, when:

a. Each individual gathering is attended by at least one member to also attends one or more other gatherings in the series (Ala. Code § 36-25A-2(13)1);

b. The total number of members attending two or more of the series of gatherings collectively constitutes a quorum (Ala. Code § 36-25A-2 (13)2);

c. The participating members deliberate specific matters that they expect to come before the Commission—in this case the specific applications and scoring (Ala. Code § 36-25A-2 (13)4);

d. The meeting was held “for the purpose of circumventing the [AOMA]” (Ala. Code § 36-25A-2 (13)5); or

e. Where “at least one of the meetings occurs within seven days of a vote on any of the matters deliberated” (Ala. Code § 36-25A-2 (13)5).

7. There is no basis for any further discovery or examination of Commissioners or agency staff and any such discovery will cause undue burden and expense on the agency and individual Commissioners. The Commission’s statutory authority, administrative regulations, voting records, minutes, meeting transcripts and public documents speak for themselves. Individual testimony regarding statutory or rule interpretation is improper,¹ as would be testimony

¹ “Although witnesses may be permitted, in a proper case, to give an opinion on an ultimate fact involved in a case, witnesses may not give an opinion on a question of domestic law or on matters that involve questions of law; expert testimony proffered solely to establish the meaning of a law is presumptively improper. Thus, an individual opinion of an expert or nonexpert that amounts to a conclusion of law cannot be properly received in evidence, because the determination of such questions is exclusively within the province of the court.” 31A AM. JUR. 2D *Expert and Opinion Evidence* § 117 (2002). *See also* 32 C.J.S. *Evidence* § 851 (2008) (“As a general rule, an expert witness may not give his or her opinion on a question of domestic law [as opposed to foreign law] or on matters which involve questions of law, and an expert witness cannot instruct the court with respect to the applicable law of the case, or infringe on the judge’s role to instruct the jury on the law.... An expert may not testify as to such questions of law as the interpretation of a statute, ... or case law, ... or the legality of conduct.”). *Ex parte Alabama Power Co.*, --- So. 3d ---, 2011 WL 3633099, at *9 (Ala. Aug. 19, 2011). MCMK-EVID § 12. While the Commissions interpretation of its own

by any individual expanding on the meaning of prior decisions or determinations by the Commission as a whole. Further, questions regarding the individual opinions or other mental processes of members of Commission members are neither material nor relevant and are protected by the Deliberative Process Privilege. Likewise, any similar questions directed at the Commission staff will inevitably intrude upon the deliberative process at the Commission.

8. A Protective Order limiting the scope of discovery is particularly important at this juncture in the administrative process. The investigative hearings, which have not yet commenced, will require the continuing exercise of judgment and discretion on the part of Commissioners. Likewise, the outcome of the current court proceeding any properly filed appeals, is also unknown. Should this case later be remanded back to the Commission, either by this Court or upon appellate review, the Commission and its staff will be further involved in yet more proceedings. The Plaintiffs should not be permitted to use the discovery process to harass the decision makers or otherwise gain advantage in these proceedings.

9. Finally, AA's claims regarding alleged non-compliance with the Administrative Procedure Act are properly raised in an appeal, and do not provide an independent basis for discovery. AA's claims that the challenged action violates statutory provisions and rules, or were otherwise made upon unlawful procedure, are among the specified basis for an appeal under the AAPA and are premature given the yet to commence investigative hearing process. Should the court on appeal find that additional administrative proceedings or findings are required, it may remand the case back to the Commission with instructions. Ala. Code § 41-22-20 (k).

regulations and underlying statutes are due deference by this Court, such interpretations are made and expressed in the course of actions taken by the Board or, in some cases, its Executive Director, and not through oral deposition testimony by individual members.

10. As to the Commission's alternative request for entry of a Protective Order, the undersigned certifies that, at approximately 10:45 AM on this date, he has sought to confer with opposing counsel in a good faith effort to reach agreement without the need for further court action. Several of the opposing counsel have responded indicating that they will be delayed in responding due to other commitments. Given the deadlines involved, counsel is filing this Motion and will update the court of any status change.

WHEREFORE, premises considered, the Commission moves this Court to reconsider its order granting discovery and to deny the Plaintiffs' motions. Alternatively, the Commission moves for entry of a Protective Order limiting the scope of discovery to those facts establishing the: (A) existence of any non-public meeting of a quorum of the Board in which the specific applications, or their rankings, were deliberated as specified in Ala. Code § 36-25A-2 (1),(6) and (12), or (B) existence of a prohibited "serial meeting" as specified in Ala. Code § 36-25A-2(13)1-5.

A Proposed Order granting a Protective Order is attached hereto.

RESPECTFULLY SUBMITTED, on this the 5th day of January 2024.

/s/ Mark D. Wilkerson

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served on all counsel of record by directing same to the address via United States first class mail, postage prepaid, or by electronically filing the foregoing with the Clerk of Court using the AlaFile system, which will send notification of such filing on this the 5th day of January 2024:

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PROTECTIVE ORDER

This matter is before the Court on the Motion of the Defendant, in the alternative, for entry of a protective order pursuant to Rule 26(c) of the Alabama Rules of Civil Procedure.

For good cause shown, IT IS ORDERED THAT the Court’s Order granting expedited discovery [Doc. 646] is hereby amended to limit Plaintiffs’ written discovery and oral questioning to those facts that would constitute a potential AOMA violation, specifically:

1. The existence of any non-public meeting of a quorum of the Board in which the specific applications, or their rankings, were deliberated. Ala. Code § 36-25A-2 (1),(6) and (12).
2. The existence of any meeting, not open to the public, involving two or more Commission members not involving a quorum, when:
 - a. Each individual gathering is attended by at least one member to also attends one or more other gatherings in the series (Ala. Code § 36-25A-2(13)1);
 - b. The total number of members attending two or more of the series of gatherings collectively constitutes a quorum (Ala. Code § 36-25A-2 (13)2);
 - c. The participating members deliberate specific matters that they expect to come before the Commission—in this case the specific applications and scoring (Ala. Code § 36-25A-2 (13)4);
 - d. The meeting was held “for the purpose of circumventing the [AOMA]” (Ala. Code § 36-25A-2 (13)5); or

e. Where “at least one of the meetings occurs within seven days of a vote on any of the matters deliberated.” Ala. Code § 36-25A-2 (13)5.

Without limiting the forgoing, the Plaintiffs shall not engage in written discovery or a line of questioning seeking the mental processes of individual Commissioners or staff members regarding any prior decision or any matter that may come before the Commission in the future.

Nothing in this Protective Order shall prevent any party from objecting to discovery that it believes to be otherwise improper or to require disclosure of materials which a party contends are protected from disclosure by the attorney-client privilege or the attorney work-product doctrine. Any plaintiff who objects to a claim of privilege by the Commission may move the court for an order to produce the specified information, in which event the Commission’s privilege determination will stand until the Court rules on the motion or the parties reach agreement on the issue.

The Court shall retain Jurisdiction to enforce or modify this Protective Order.

DONE AND ENTERED this the ___ day of January, 2023.

Hon. James H. Anderson
CIRCUIT JUDGE